IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

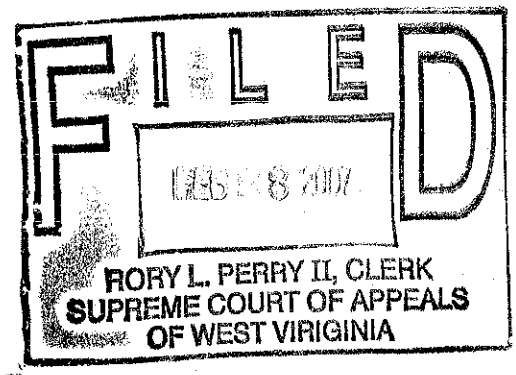
Angela Adkins,

Appellee (Petitioners below),

vs.

Christopher Adkins,

Appellant (Respondent below)



BRIEF OF APPELLANT

Docket No. 33312

On appeal from the Family Court of Cabell County
C.A. No. 04-D-612

By Counsel:
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I. Statement of the Facts of the Case

The parties were divorced by Final Order entered on September 2, 2004. In said Order, child support was set at $392.67/month based on the Appellant earning $9.12/hour as a truck driver at Lowes. As set forth in the Order, the parties separated on or about June 9, 2004. Shortly after that separation, the Appellee's family made a report to the Huntington Police Department. They alleged that nearly one year prior to the separation, on or about August, 2003, the Appellant had committed the crime of 3rd degree sexual assault. The Respondent was charged with the crime after the Final Divorce hearing. The Appellant plead guilty to said crime on February 17, 2006. He was sentenced and started his prison term on April 12, 2006 and is currently serving a sentence of two to ten years for that crime. It is also important to note, that the Appellant has no other assets from which to pay his child support obligation.[1]

On June 5, 2006, after it was apparent that Appellant was not going to be able to meet his child support obligation while incarcerated, he petitioned the Family Court of Cabell County to modify his child support obligation. In said Petition he asked that child support be set at $0, or in the alternative that it be set at a minimum of $50/month.[2] On September 19, 2006, the Family Court denied the Petition and also denied a request that at the very least the Court should attribute minimum wage as opposed to calculating support based upon the Appellant earning $9.12/hour. The Family Court Judge found that "child support shall remain as currently set because Respondent is in jail due to his own behavior. It is his fault that he cannot work. When he committed the crime,

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[1]In some jurisdictions, when an obligor does have assets, those assets can be used to pay his support obligation during incarceration.

[2]He added that if child support was set at $50, that he believed his mother would be in a financial position to help him make that payment and stay current in his child support obligation.

it was the same as voluntarily quitting his job and therefore he cannot reduce his child support."

Case law varies from state to state as to whether an incarcerated inmate has a right to have their child support reduced or eliminated. There is no specific law in West Virginia regarding this issue. The rulings vary from county to county and even within counties. If the Appellant's child support is not reduced, the Appellant will go further into arrears and will have such a high amount of child support owed when he is released, that he will not even be able to make the interest payment, let alone the amount of basic support.

Due to the current arrears that have accumulated since his incarceration, the Bureau for Child Support Enforcement has already taken steps to take his Driver's License[3]. As he earns his living driving trucks, or at the very least needs a driver's license to get to and from any job, when he is released from prison, he will be unable to drive unless this Court takes action and eliminates his current child support obligation.

II. <u>Points and Authorities</u>

A. *Porter v. Bego*, 488 S.E. 2d 443 (W.Va. 1997).

III. <u>Discussion of Law</u>

A. An incarcerated convict should not be attributed income as they are unable to work. Furthermore, said inability is not voluntary and is not for the purpose of reducing or eliminating child support.

Although there is no specific case law in West Virginia on the child support obligation of an incarcerated inmate, there is case law on attribution of income. *Porter v. Bego*, 488 S.E. 2d 443 (W.Va. 1997) is the main case on attribution of income. In that case the court pointed out when

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[3]In the same Order this appeal is based on, the Family Court did stay that action until the Appellant is released from Jail.

determining whether to attribute income to a parent, the Court should look at what a "....reasonable, similarly situated parent would have done had the family remained intact...". That in the case at hand, the crime occurred while the parties were still together. Had the family remained in tact, the children would not have benefitted from the Appellant's income as he would have been incarcerated and would not be earning income.

In *Porter* the Court stated that if a parent "...voluntarily, and without cause..." acts to reduce his income, then income can be attributed at their prior income or at a minimum what they could earn working 40 hours a week at Federal minimum wage. Appellant did not voluntarily quit his job. He is temporarily unable to perform his job due to his prison sentence. Although he technically voluntarily committed the crime, he didn't do so with the intent of reducing his child support. Intent to commit a crime is not the same as intent to reduce child support. One does not commit a crime with the intent of serving time in jail. The prison sentence was not voluntary and it is only because of that sentence he is unable to work.[4] He has no earning capacity in jail and therefore attribution of income at any level is improper.

B. Public Policy as Considered in other states.

Many states have adopted the position that imprisonment is not voluntary and therefore it is not proper to attribute income. Below are a few examples of those rulings.

1. Going to prison is not a voluntary act.

A. Pennsylvania - In *Leasure v. Leasure*, 549 A.2d 255 (Pa. 1988), the father was sent

[4]Appellant did request work release or home confinement but was denied the same.

to jail for a crime unrelated to child support[5]. The lower court refused to modify his child support saying that his prison sentence was "voluntary". The appellate court reversed that decision. They found that his incarceration was involuntary and it was "highly unlikely" that he would have gone to prison to avoid paying child support.

B. Alaska - In *Bendixon v. Bendixen*, 962 P.2d 170 (Alaska 1998), the Court found that incarceration is not a voluntary act as the goal of criminal conduct is not jail time.

C. Washington D.C. -In *Lewis v. Lewis*, 637 A.2d 70 (D.C. 1994), the Court found that going to jail is not a voluntary act.

D. Maryland - In *Sowers v. Reid*, 704 A. 2d 158 (Md. App.1998), the Court found that a person is only voluntarily imprisoned if they committed a crime with the intention of going to jail.

2. It is improper to impute income

A. Arizona - In *Arizona ex rel Department of Economic Security v. McEvoy*, 955 P. 2d 988 (Ariz. Ct. App. 1998), the presumption that an obligor can earn minimum wage is rebutted due to incarceration.

B. Oregon - In *Oregon v. Vargas*, 70 Cal. App. 4th 1123, 83 Cal. Rptr. 2d 229 (1999), income cannot be imputed because the obligor has no earning capacity.

C. Florida - In *Pickett v. Pickett*, 708 So. 2d 182 (Fla. 5th DCA 1998), the Court found that imputation of income was not proper unless there was evidence that the obligor

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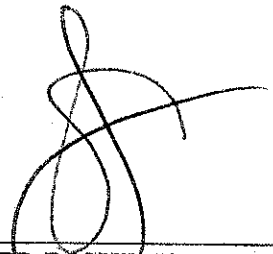
[5]This is important to note because rulings do greatly differ when one is imprisoned because they have not paid child support. Unfortunately for the appellant, unless something is done about his child support obligation, upon his release from prison, he could be facing another prison term due to the arrears that will accumulate while he is serving the current prison sentence.

could earn income while incarcerated.

IV. Relief Prayed for

Wherefore the Appellant prays that the ruling of the Family Court Judge be overruled, that child support be set at $0, and that said support be retroactive to the date of the filing of the Petition to Modify child support in June, 2006.

Christopher Adkins
By Counsel



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Certificate of Service

I, Jennifer Dickens Ransbottom, counsel for the Applellant, do hereby certify that I have served the foregoing "*Brief of Appellant*" by United States Postal Services, postage prepaid, to the following this 27th day of February, 2007.

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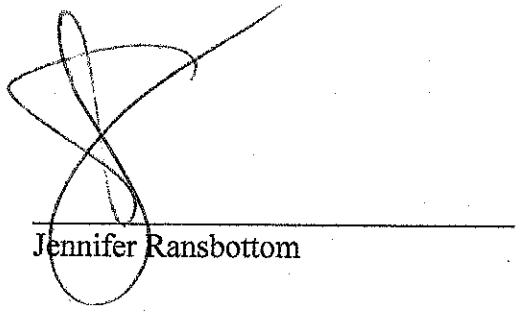

Jennifer Ransbottom